United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1868

In the

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

No. 74-1868

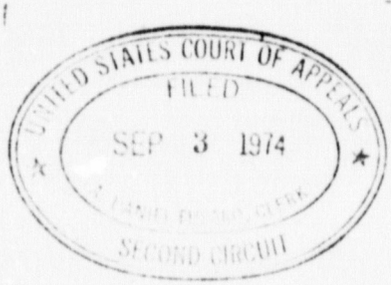
KATRINA McEACHERN,
Plaintiff-Appellant

v.

ANDREW CONSIGLIO, et al,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF PLAINTIFF-APPELLANT



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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

KATRINA McEACHERN	:	
	:	NO. 74-1868
VS.	:	
	:	AUGUST 29, 1974
ANDREW CONSIGLIO, ET AL	:	

CERTIFICATION OF SERVICE

This is to certify that two copies of Appellant's brief and one copy of the joint appendix have been personally delivered to the offices of Roger J. Frechette, Esquire, 215 Church Street, New Haven, Connecticut, and George Eastman, Esquire, 265 Church Street, New Haven, Connecticut, this 29th day of August, 1974.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATRINA McEACHERN,

Plaintiff-Appellant,

V. No. 74-1868

ANDREW CONSIGLIO, individually and in his capacity as an Officer in the New Haven Police Department, and CURTIS WILLOUGHBY, individually and in his capacity as an Officer in the New Haven Police Department,

Defendants-Appellees.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

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ISSUES PRESENTED FOR REVIEW

I. Whether the trial court incorrectly charged the jury with respect to the defense of good faith and probable cause in an action under Title 42, United States Code, Section 1983, by instructing the jury that if the defendant officers held a reasonable good faith belief that their actions were lawful, they would have a defense, rather than by requiring the officers to prove that they had probable cause under constitutional standards in order to establish their defense.

II. Whether the trial court incorrectly charged the jury with regard to whether a search is constitutional under Fourth Amendment standards, where the court did not require the jury to find that the search was based on probable cause in order to conclude that it was "reasonable" and therefore constitutional.

STATEMENT OF THE CASE

Appellant filed suit in the District Court for the District of Connecticut, under Title 42, United States Code, Section 1983, against two named police officers of the City of New Haven. Jurisdiction of the court was invoked under Title 28, United States Code, Section 1343(3). Appellant alleged that her civil rights had been violated by an unconstitutional search of her home by the defendants. The case was tried to the jury before the Honorable Jon O. Newman, District Judge. The trial was concluded on May 16, 1974, and the jury found for the defendants. Judgment was entered for the defendants on May 17, 1974.

Appellant appeals from final judgment entered against her, on the basis of the instructions of the trial court to the jury. Notice of appeal was filed on June 14, 1974.

STATEMENT OF FACTS

A. Plaintiff's Evidence

At trial, the plaintiff testified that for many years she had been the owner of a two-family house at 671 Winchester Avenue in New Haven, where she resided on the first floor with her husband and four children. She testified that when she arose from bed on the morning of July 7, 1971, her daughter informed her that police officers had broken into the house during the night while the family slept. She testified that she observed the back door of the apartment to have been knocked loose on its hinges in such a way that it would not fully close. She testified that she immediately reported the incident to the New Haven Police Department, which conducted an investigation but provided no explanation or compensation for the damage to the door.

The plaintiff's husband, a metal worker, testified that he removed the door from its hinges and repaired it before going to work on July 7.

Gwendolyn McEachern, the plaintiff's eldest child, testified that she had spent most of the night of July 6-7, 1971, in her bedroom talking to friends on the telephone. She testified that she ended her last telephone conversation around 4:00 A.M. on July 7 and that very shortly thereafter she heard a loud noise at the back door. She said a group of men entered the apartment and, aided by a flashlight, looked into some of the darkened rooms. She testified she overheard conversation to the effect that they must have entered the wrong house, and that they thereupon departed. She testified that she went to a window and

observed several police cars parked in the street. She said the officers had not knocked or otherwise announced themselves before entering the family's apartment. She said she returned to bed and told her mother of the incident in the morning.

The plaintiff and all the members of her household testified that they had had no previous difficulty with the police.

B. Defendants' Evidence

The defendants testified that, sometime between 3:00 A.M. and 5:00 A.M. on July 7, 1971, they had received a telephone call from a police informant who had provided one of them with information concerning narcotics law violations on eleven previous occasions. They testified that all of the informant's eleven previous tips had resulted in arrests. They testified that they immediately met personally with the informant, who stated that two brothers named Jones had just received a narcotics shipment, had taken it to their home, and were planning to remove the drugs shortly after dawn to another location in the city for "cutting" and distribution to sellers. They testified that the informant pointed out the plaintiff's house as being the residence of the Jones brothers.

The defendants testified that the house at 671 Winchester Avenue appeared to be dark. They said they went to the back door, knocked, and announced that they were police officers. They testified they heard a noise inside the house, which they were unable to identify, and thereupon broke open the door and entered the kitchen area of the home. They testified that they heard the voice of a young woman asking who

was there. They said they asked her whether the Jones brothers lived there and that she told them the Jones brothers lived across the street at 657 Winchester Avenue. They testified that they immediately left the apartment, without going beyond the kitchen and without ever meeting the woman to whom they had spoken. They testified that they went directly across the street, broke open the rear door to 657 Winchester Avenue, searched the premises and seized narcotics but made no arrests.

The defendants testified that they had entered both homes without search or arrest warrants because they feared the Jones brothers might leave the house before a warrant could be obtained.

C. Charge to the Jury

At the conclusion of the evidence, counsel addressed the Court with regard to instructions to the jury. The Court indicated that it intended to charge the jury that the officers would have a defense "if they acted with the subjective good faith that in their own minds they were in good faith, and if objectively they had a belief in the validity of what they were doing, that is to say, the lawfulness of what they were doing, and if that belief objectively was a reasonable one." (A. 35) Counsel for the plaintiff-appellant objected, stating, "For the record, I would like to say that to the extent which your Honor's decision does not follow the Joseph versus Rowlen case, I would object to the --" (interrupted by the Court.)[1] (A. 35) The Court stated that there was

1. The case of Joseph v. Rowlen, 402 F.2d 367 (7 Cir. 1968) is discussed in the Argument herein. Briefly, the case stands for the proposition that the officers must prove the existence of probable cause in the constitutional sense to establish their defense.

no question it would not follow that case for the reason that it felt obliged to follow the language of this Court in Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (1972). (A. 35-36) Earlier in the colloquy, the Court had indicated that it had thought the Supreme Court decision in Pierson v. Ray, 386 U.S. 547 (1966), held that the only issue was whether the constitutional violation had been committed, and that good faith in that case referred to the officer's belief in the constitutionality of a statute. However, the Court noted that the Bivens decision by this Court stated that a standard less stringent than the constitutional standard would be a defense to a police officer's liability. The Court stated that it was "troubled by that" but was "obliged to follow it." (A. 21-22) The Court's charge on the points argued herein is at pp. 47-58 of the Appendix.

Following the charge to the jury, counsel for the plaintiff-appellant excepted to the Court's instructions with regard to the standard of defense available to the officers. (A. 60-61) The Docket Sheet is in error in noting that no exception to the charge was taken by the plaintiff. (A. 10) Although counsel originally stated he was not excepting to the charge, this was corrected in further colloquy with the Court.

ARGUMENT

I. THE COURT BELOW INCORRECTLY CHARGED THE JURY THAT THE OFFICERS COULD ESTABLISH A DEFENSE TO THEIR ACTIONS BY PROVING THAT THEY HAD A REASONABLE GOOD FAITH BELIEF THAT THEIR ACTIONS WERE LAWFUL, RATHER THAN REQUIRING THE OFFICERS TO PROVE THAT THEY HAD PROBABLE CAUSE FOR THE SEARCH THEY CONDUCTED, AS DETERMINED BY CONSTITUTIONAL STANDARDS.

A. The Previous Decision Of This Court in Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (1972), Is Not A Correct Statement Of The Law With Regard To The Defense Of Good Faith And Probable Cause To An Action Under Title 42, United States Code, Section 1983, For A Violation Of Civil Rights.[1]

Following remand from the Supreme Court, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1970), this Court considered the question of whether federal law enforcement agents were immune from suit for Fourth Amendment violations. After deciding that such officers have no such immunity, the Court went on to discuss the defense available to such officers of "good faith and probable cause" for their actions.

The discussion of this point in the Bivens opinion is dictum and the issue was not maturely before the Court. All that the Court needed to decide in Bivens was that the federal agents did not have immunity.

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1. Title 42, United States Code, Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The question of any defenses which such officers might have would have been better left to the district court during a trial on the merits, or to a subsequent appellate consideration. Thus the statements made in Bivens, as dictum, with regard to the definition of the "good faith and probable cause" defense are not controlling in this case. Appellant therefore requests that the opinion in Bivens be reconsidered and that the content of the "good faith and probable cause" defense be redefined in light of the principles argued in this brief.

In Bivens, this Court stated that in order to establish a defense an officer[1] need not establish that he had probable cause in the constitutional sense, but must merely prove that he in good faith believed that his actions were lawful and that this belief on his part was a reasonable belief. 456 F.2d at 1348. Appellant contends that this formulation is an incorrect statement of the law, and that to establish a defense an officer must prove that he had "good faith and probable cause," defining probable cause under applicable constitutional standards.

B. Decisions Of The United States Supreme Court Require That An Officer Prove That He Had Probable Cause Under Constitutional Standards To Establish A Defense To A Civil Rights Action Alleging Illegal Arrest Or Illegal Search And Seizure.

An analysis of the "good faith and probable cause" defense must begin with the case of Pierson v. Ray, 386 U.S. 547 (1966). In that

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1. The Court treated the standards applicable to federal and state officers as the same. Appellant agrees with this result and concludes that it is mandated by the fact that both must submit to constitutional principles when their actions are reviewed by the courts.

case, an integrated group of clergymen had been arrested in a segregated bus terminal in Mississippi for breach of the peace. The statute under which they were arrested was subsequently declared unconstitutional. A damage action was filed under Title 42, U.S.C. §1983 against the arresting officers.

In discussing the question of whether the officers were immune from suit, the Court held that they had a defense if they acted with good faith and probable cause in making the arrest. The Court stated:

> We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983. This holding does not, however, mean that the count based thereon should be dismissed. The Court of Appeals ordered dismissal of the common-law count on the theory that the police officers were not required to predict our decision in Thomas v. Mississippi, 380 U.S. 524. We agree that a police officer is not charged with predicting the future course of constitutional law. But the petitioners in this case did not simply argue that they were arrested under a statute later held unconstitutional. They claimed and attempted to prove that the police officers arrested them solely for attempting to use the "White Only" waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a disturbance. The officers did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. Rather, they claimed and attempted to prove that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional. Id., at 557.

This lengthy quotation, or various parts of it, have been quoted in a variety of decisions since Pierson, and it is the starting point of any analysis of the defense. Appellant argues that it is clear that the Supreme Court was holding that in order to make the defense, a police officer must have probable cause, in the constitutional sense, for an arrest or search.

In the Pierson case, there were two questions presented by the arrest. The first was the constitutional validity of the statute. On this subject, the Court held that if the officers had "believed in good faith that the arrest was constitutional" they would not have been required to predict the future course of constitutional law. The second question was whether there was probable cause to arrest for breach of peace, i.e., whether violence was threatened at the time the arrest was made. This question would be decided by whether or not "the jury believed the testimony of the officers and disbelieved that of the ministers." These two questions were the content of the "good faith and probable cause" defense.

Appellant submits that it is a mistake to read the opinion as though the Court were saying that if the officers in good faith believed they had probable cause for the arrest, then they had a defense. There is nothing in the opinion to support this conclusion. In the factual situation in Pierson the relevance of the officers' good faith was to their belief in the constitutionality of the statute. The question of probable cause was one of fact to be decided on the basis of whether the jury believed the officers' testimony that violence was threatened. The Court made it clear that the jury would have to find both the element of

probable cause (by disbelieving the ministers) and the element of good faith (in the officers' belief in the constitutionality of the statute) to find for the defendants.

In Pierson the factual situation was such that it would have been impossible for the officers to have a reasonable good faith belief that they had probable cause if in fact they did not. The testimony was in sharp conflict on whether there was a crowd present at the station or not. The ministers testified there was no crowd; the officers, that 25 to 30 people were present who were in a very dissatisfied and ugly mood. Clearly the jury had to believe one side or the other, and if they believed the officers, then assuming the statute to be constitutional, there was probable cause for the arrest. Under the facts of the case, it would have made no sense at all to charge the jury that the officers might have reasonably believed the arrest to be lawful even if the jury believed the ministers and found no probable cause in the constitutional sense. Therefore, the reading of Pierson given by this Court in Bivens has no basis in the factual situation of that case.

Additional support for the proposition that the Supreme Court intended constitutional probable cause to stand as the defense in Pierson may be gathered from the earlier decision of the Court in Henry v. United States, 361 U.S. 98 (1959). That case involved an application of the exclusionary rule, but the Court made clear that the standard of probable cause is the same whether applied to the evidence against a defendant in a criminal case, or whether used to judge the actions of the officers who made a search. The Court explained:

> Evidence required to establish quilt is not necessary. Brinegar v. United States, 338 U.S. 160; Draper v. United States, 358 U.S. 307. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. Stacey v. Emery, 97 U.S. 642, 645. And see Director General v. Kastenbaum, 263 U.S. 25, 28; United States v. Di Re, [332 U.S. 581], at 592; Giordenello v. United States, [357 U.S. 480], at 486. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. Carroll v. United States, 267 U.S. 132, 156. And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. Carroll v. United States, supra, at 155-156. This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen. (emphasis added) Id., at 102.

This language makes clear that probable cause means the same thing for the police officer and for the citizen. The language of the Court recognizes that it is the probable cause standard which strikes the appropriate balance between protecting the privacy of the citizen and protecting the integrity of the officers' efforts at law enforcement.

The rationale of this Court in Bivens was that a police officer must not be held to act at his peril in making decisions about probable cause because learned jurists have had difficulty in defining the rules that govern a determination of probable cause. Both the opinion of the Court and the opinion of Judge Lumbard, concurring, took the position that the police officer must be given room in which to err with respect to constitutional probable cause, and that if his error was a reasonable one, as judged by a tort standard, he would have a defense.

Appellant respectfully submits that this reasoning mistakes the nature and the constitutional purpose of the probable cause determination. In Brinegar v. United States, 338 U.S. 160 (1948), the Supreme Court elaborated on the constitutional policies served by the probable cause standards in terms repeatedly recited by the Supreme Court. See, Draper v. United States, 358 U.S. 307, 313 (1958); Beck v. Ohio, 379 U.S. 89, 91 (1964). The Court said that the probabilities which have to be assessed in making the determination "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, supra, at 175. The nature of the determination is a common sense one. The Supreme Court has always characterized the decision in this way, even when it is made by a magistrate on a warrant application. The Court concluded its opinion in Spinelli v. United States, 393 U.S. 410, 419 (1968) by reiterating that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause," "that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial," and "that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense."

The constitutional purpose of protecting citizens' privacy and the need for effective law enforcement are both served by the requirement of probable cause. In Brinegar, the Court explained this dual function of the standard:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice. 338 U.S., at 176.

The Bivens rule ignores the fact that the probable cause standard is one which already is a compromise between the interests of individual citizens and the interests of law enforcement. It ignores the fact that the requirement of probable cause already gives the police officer reasonable room to make mistakes.

The fact that appellate courts may differ as to whether probable cause existed in a given case is beside the point. They will also differ as to whether an officer's belief in the lawfulness of his actions was objectively reasonable. The reasonable man standard of tort liability has not saved appellate courts from splitting hairs in close cases, nor will the Bivens rule protect an officer from making difficult decisions in situations of marginal probable cause.

The Bivens rule, however, does allow an officer to arrest or search without probable cause without consequence if he can convince a jury that he reasonably believed that his action was lawful. The potential for abuse of citizens' rights is increased to the extent that police are not held to constitutional standards. In close cases where it is difficult for

a policeman to make a determination he should be encouraged not to act without a warrant. The Bivens rule has the contrary effect. By giving the officer greater latitude in which to make mistakes, he is encouraged to arrest or search in cases of doubtful validity.

In this regard, it must be remembered that the Supreme Court "has uniformly condemned searches and seizures made without a search warrant, subject only to a few 'jealously and carefully drawn' exceptions." Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. Law Rev. 349, 358, Jan., 1974, and cases cited therein. The courts do not serve Fourth Amendment interests if they adopt rules which will encourage officers to act if they possess no warrant and are unsure if they have probable cause.

The additional protection afforded the officer by the Bivens rule creates a hiatus between the expectation of privacy to which the citizen is entitled under the Fourth Amendment, and the standard to which the officer will be held when he is called to answer for an alleged violation of that privacy. In so doing it destroys the careful balance between competing interests established by the Fourth Amendment, and creates an area in which citizens have no protection for their rights and officers have no sanctions on their illegal actions. This hiatus is fundamentally inconsistent with the commands of the Fourth Amendment and with the policy of §1983 to provide a remedy for constitutional violations.

In Scheuer v. Rhodes, _____ U.S. _____, 42 LW 4543 (April 17, 1974), the Supreme Court faced the question of the possible immunity of the Governor and other high executive officers of the State of Ohio from

suit under §1983 for the killings at Kent State. The Court noted that in the evaluation of police conduct relating to an arrest the guideline is "good faith and probable cause," citing Pierson. The Court went on to say, "In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices--whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions--is virtually infinite." 42 LW at 4547. The Court noted that high executive officers did have in common with police officers the frequent need to act swiftly and firmly in situations where action deferred would be futile, but concluded after discussion:

> In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad....These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct. 42 LW at 4548.

This decision of the Supreme Court makes clear that the standard enunciated by this Court in Bivens, reasonable grounds for a good faith belief in the lawfulness of actions, is appropriately applied to higher executive officers with greater responsibilities and who make more subtle decisions than do police officers. Applying the reasonableness standard to high executive officials will not create a hiatus between citizens' expectations of privacy and standards of liability for officials, because such

high officials do not make arrests and searches and their decisions normally would not raise Fourth Amendment problems susceptible of analysis in terms of probable cause to arrest or search. The Court explicitly contrasted such persons with police officers, and the opinion would suggest that there is a sliding scale between high executive officers with qualified immunity and police officers who are held to the standard of probable cause. In Pierson, the Court did not hold that the police officers were immune from suit, and did not even state that they had a qualified immunity. Rather the good faith and probable cause considerations were characterized as a defense available to officers in a §1983 case.

This Court in Bivens specifically held that federal officers performing police duties do not warrant the protection of the immunity defense because they do not perform discretionary functions. 456 F.2d at 1346. The Court discussed the sliding scale later suggested by the Supreme Court in Scheuer, and cited with approval the language of Note, Immunity of Prosecuting Officials From Suit for Alleged Deprivation of Civil Rights, 40 Temp. L. Q. 244, 250 (1967), that, "The tendency to hold a public official accountable appears to increase as the discretionary scope of his duties decrease (sic). Hence, police officials, whose job is to enforce the law, are not given immunity."

Appellant submits that this Court's opinion in Bivens correctly appreciates the differences between police officers and high executive officials who exercise discretion, but incorrectly delineated the defense available to police officers. If a reasonableness standard is appropriate for high executive officers, then it is clear that a stricter test must be

applied to police officers at the lower end of the scale. That test must be the constitutional standard of probable cause for arrests and searches.

C. The Defense Accorded The Officers By The Court's Charge Below Is An Anomoly In That It Provides Innocent Persons Less Protection For Their Constitutional Rights Than That Accorded To Possibly Guilty Persons In Criminal Actions.

The rights of criminal defendants whose constitutional rights have been violated are protected by the exclusionary rule. In a case involving an unconstitutional search and seizure, it is often the case that the defendant is certainly guilty of the crime with which he is charged, particularly if it is a possessory offense. Nonetheless, he is allowed to go free when the critical evidence against him is suppressed under the exclusionary rule.

In applying the exclusionary rule, the Courts are of course governed by considerations of probable cause. "Good faith on the part of the arresting officers is not enough." Henry v. United States, supra, at 102, cited in Beck v. Ohio, supra, at 229.

When the police break into an innocent person's home and conduct an illegal search, no evidence is seized, no prosecution is commenced and the exclusionary rule never comes into play. Such a person has only the remedy of a damage action and such complaint procedures as police departments themselves provide to redress the damage done to him. Such a person certainly ought to have a right to expect the same constitutional standards to be applied in judging the police action as would be applied in suppressing evidence or dismissing a case against a criminal defendant who had actually been found in possession of contraband or evidence of criminal activity.

When our courts have for one reason or another not applied the exclusionary rule to a criminal defendant, they have traditionally assumed that the individual would be able to press his rights in a damage action. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (N.Y. Ct. of Appeals 1926) is the often cited case in which Justice Cardozo refused to adopt the exclusionary rule as state law in New York and refused to hold that, "The criminal is to go free because the constable has blundered." 150 N.E. at 587. Justice Cardozo noted that it was an undisputed consequence of the illegal search in that case that the officer might have been sued for damages. 150 N.E. at 586-587.

In the recent Supreme Court case of United States v. Calandra, _____U.S. _____, 94 S. Ct. _____, 38 L Ed 2d 561 (1974), the Court refused to allow a grand jury witness to invoke the exclusionary rule to his benefit. The Court noted, however, that he would not necessarily be left remediless in the face of an unlawful search and seizure and might pursue a damage action. 38 L Ed 2d at 575, fn. 10.

When the exclusionary rule is not available to criminal defendants, or more tellingly, when no criminal prosecution has even been commenced against an innocent victim of an illegal search, the civil remedy available to such a person ought to impose the same standards on police conduct that are constitutionally required in cases falling under the exclusionary rule. That is not the result of the charge of the Court below.

The charge in this case and the opinion of this Court in Bivens do not require that the officer's conduct be measured against the standard

of probable cause, but rather against the lesser standard of reasonable good faith belief in the lawfulness of one's actions. This rule suggests that the constitutional rights of innocent victims of police misconduct are less worthy of protection that the rights of criminal defendants found in possession of incriminating evidence. The disparity between the two standards can have no basis in law or policy, and the resultant discrimination against the rights of such innocent victims, if baldly stated, would certainly be shocking to our citizenry.

D. The Reasonable Good Faith Belief Standard As A Defense To §1983 Actions Is Not Required For The Protection Of Police Officers.

It would appear that the reason for the disparity between the standard of probable cause in exclusionary rule determinations and the standard of reasonable good faith belief in civil actions implicit in the Bivens rule, lies in the apprehension of the "unfairness" of holding police officers personally liable for making wrong decisions in close questions of probable cause. This Court stated in Bivens that the "police officer must not be held to act at his peril" in such situations, and is entitled to the "protection" of the reasonableness standard. 456 F.2d at 1348.

This is a policy argument based on weighing the competing interests of the protection of individual police officers against the constitutional rights of citizens. Courts do not reach this specific issue in exclusionary rule cases, because although the defendant is allowed to go free, no sanction is applied directly against the officer. However, as argued above, the exclusionary rule decisions of the Supreme Court do make clear that it is the standard of probable cause which strikes the

necessary balance between the interests of effective law enforcement and protection of citizens' rights.

Appellant respectfully submits that this policy argument was not fully explored in this Court's decision in Bivens, and that the conclusion reached was incorrect. In this respect, it is worth repeating that the statements of the Court in this regard in Bivens were dictum and the issue was not properly before the Court.

This Court in Bivens appeared to assume that adherence to the probable cause standard would result in the personal exposure of the officer to the payment of judgments in money damages. That is not necessarily the case. The risk that an officer will mistakenly violate a citizen's rights although acting in good faith is certainly an insurable risk. Although decisions of the Supreme Court and the mandate of the Eleventh Amendment make clear that municipalities and states may not be sued directly under §1983, it does not follow that they may not purchase insurance to pay judgments in cases against police officers. Indeed, many municipalities have such insurance contracts which protect individual officers from the risk that their personal finances will be threatened by liabilities arising from their official duties. Certainly to the extent that a rule of law holding officers liable unless they could establish that their actions were founded in probable cause would increase the danger of judgments against them, one might expect individual police officers and their unions to insist that the protection of insurance coverage be provided as a condition of their employment contracts.

Therefore, the balance is not really between the danger to officers' personal finances and the protection of citizens' constitutional

rights. The balance is really between the cost of the impairment of the protection of constitutional rights and the cost of providing insurance to pay judgments against police officers when they do violate citizens' rights. The possibility of insurance coverage to protect individual officers is a social alternative which the courts must consider in weighing the competing interests at stake in the question at hand. Appellant submits that taking into account the alternative of insurance coverage, the Court is not really confronted with a difficult decision in striking a balance between constitutional rights on the one hand and the cost of the insurance on the other.

Of course, it is not within the province of the courts to insist that police departments or municipalities provide such insurance coverage for their officers. Nor, however, is it the proper function of the courts to distort constitutional principles because of the failure of others to provide such coverage.

There is no insurance which citizens may purchase to safeguard their constitutional rights. That insurance must be provided by the courts' insistence on a strict adherence to the standard of probable cause for arrests and searches and seizures. Appellant submits that the courts must enforce these rights, relying on executive departments to insure the protection of the appropriate interests of police officers who violate these rights.

Application of probable cause standards in civil cases will not interfere with effective law enforcement any more than the use of these standards does in criminal cases. Appellant contends that insofar as a requirement of actual probable cause for a defense against a suit for un-

lawful search would deter police officers from acting in situations presenting close questions of the existence of probable cause, it is salutary and serves the interests of protecting Fourth Amendment rights. In such situations, officers should not act on their own and should seek the ratification of the judgment of an impartial magistrate before searching.

In some situations that may result in inaction which allows guilty persons to escape detection and punishment, but the same is true for the standards the police are to follow under decisions of the courts interpreting the exclusionary rule. We cannot say that requiring probable cause in civil cases will impede law enforcement any more than requiring it in criminal cases does, unless it be said that police officers may ignore the standards enunciated in exclusionary rule cases. For the Court to base its decision on that footing would be cynical, to say the least. If, on the other hand, courts seriously expect police to follow constitutional standards as a result of the exclusionary rule, then there is no basis for saying that applying the same standards in civil cases will interfere with effective law enforcement.

In fact, with respect to law enforcement, the policy considerations must be seen to be exactly the same in criminal and civil cases. Those considerations dictate that the Fourth Amendment probable cause standards in both cases do strike the appropriate balance between the social interest in effective law enforcement and the interests of the citizenry in the protection of their privacy against governmental intrusions.

E. The Decision Of This Court In Bivens Is Inconsistent With The Decision Of The Supreme Court Remanding The Case.

The Supreme Court opinion did not consider the immunity issue, since it had not been decided by this Court in its first consideration of the case. Nor did the Court explicitly discuss the defense of good faith and probable cause. However, the question which is at issue in this case was in effect decided by the Supreme Court as a result of the position which the Government had pressed on the question of whether the plaintiff had a federal cause of action.

The Government took the position that the plaintiff only had an action in tort for invasion of privacy under state law in state courts.[1] The argument was that then the federal agents could defend on the ground that their actions were a valid exercise of federal power, but if they were shown to have violated the Fourth Amendment they would lose that defense and stand before the state law as private individuals.

In effect, that is the result of this Court's subsequent decision in Bivens. The officers are not held to the Fourth Amendment standard of probable cause, but are allowed to defend on the basis of the less stringent tort standard of reasonableness. The difference between this Court's eventual decision and the Government's position in the Supreme Court is only the name given to the cause of action. Agents may be sued for constitutional violations as opposed to state causes of action in

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1. The question of whether such a cause might be removed to the federal courts is not material to the present discussion.

tort, but the standard of proof governing their defenses will be the state tort standard, not the constitutional probable cause standard.

The Supreme Court soundly rejected this result when it was advanced by the Government. The Government's thesis was characterized as resting upon "an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court." Bivens v. Six Unknown Fed. Narcotics Agents, supra, at 391. The Court pointed out that a federal agent "possesses a far greater capacity for harm than an individual trespasser," and that accordingly, the Fourth Amendment operates as a limitation on his power regardless of whether the states would penalize the act if engaged in by a private citizen. Id., at 392. The Court reiterated that the Fourth Amendment "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." (emphasis added) Id., at 392. The Court concluded at one point that the federal question (existence vel non of a Fourth Amendment violation) was "not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action." (emphasis added) Id., at 395.

If the jury is allowed to find for the defendant upon concluding that he reasonably believed in good faith that his action was lawful, even though he acted without probable cause, it cannot be said that citizens' "absolute right" to be free from unreasonable searches and seizures will be protected. Nor could it be said that the federal question would be a

claim "both necessary and sufficient" to make out a plaintiff's cause of action. Thus it is apparent that this Court's subsequent decision in Bivens contradicts the constitutional principles of liability for officers enunciated by the Supreme Court in its consideration of the case.

Although the language cited above from the Supreme Court decision in Bivens speaks to the restraints on the authority of federal agents, it cannot be argued that a lesser standard should be applied to state or local police officers. Mapp v. Ohio, 367 U.S. 643 (1960). The same considerations apply in civil suits to enforce Fourth Amendment rights as in exclusionary rule cases, making the standard the same for federal and state officers so as to give "to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled." Id., at 660. This Court also concluded in its decision in Bivens that the same standards must be applied to federal and state officers. 456 F.2d at 1346-1347.

F. Although Lower Federal Court Decisions Interpreting The Good Faith And Probable Cause Defense Have Been Inconsistent, The Better Rule Is That Which Insists On The Existence Of Probable Cause As Defined By Constitutional Standards.

Decisions of lower federal courts following Pierson v. Ray, supra, have been divided in their definition of the good faith and probable cause defense. Seldom has the issue been faced squarely, and the discussion of the point is complete in none of the cases. The following is a review of the decisions in the various Circuits in which the issue has been raised.

In the Third Circuit, the good faith and probable cause defense was discussed briefly in a footnote in Fisher v. Volz, 496 F.2d 333, 348, fn. 27 (1974). The issue was not fully explored, and the exact nature of

the appropriate charge was left open by the Court, since the issue had not been raised in the trial court. The Court's opinion, however, explicitly holds that probable cause is constitutionally required to search a home for a fugitive. The decision is discussed at length later in this opinion. Appellant submits that it is obvious from the holding and the language of the Court in its opinion proper that a constitutional standard would be applied in defining the probable cause defense.

In the Fourth Circuit, the issue was raised in Hill v. Rowland, 474 F.2d 1374 (1973). The Court of Appeals reversed a judgment for the plaintiff because the district court had charged the jury that they must find probable cause in the constitutional sense for the officer to make out his defense. The Court adopted the reasonable belief standard. This is the only decision which appellant has found upholding the reasonable belief standard where the issue was raised squarely and made a difference in the result in the case. The opinion in the case added nothing to the reasoning of this Court in Bivens, and the appellant respectfully submits that this result is incorrect for the reasons stated in this brief.

In the Fifth Circuit, there are two decisions which bear on the issue. In Sexton v. Gibbs, 446 F.2d 904 (1971), the Court, per curiam, affirmed a decision of the district court holding that the probable cause standard must be interpreted in constitutional terms. Sexton v. Gibbs, 327 F.Supp. 134 (N.D. Tex. 1970). The district court had followed the analysis of Pierson used by the Court in Joseph v. Rowlen, 402 F.2d 367 (7 Cir. 1968), and concluded:

> Law enforcement is of paramount importance to the public at large, especially in this day and time, and it should be that it is of equal importance that law enforcement observes and protects Constitutional rights as well as the prevention of crime and the apprehension of the criminal. 327 F. Supp. at 142.

In a later Fifth Circuit case, a different panel of the Court decided Rodriguez v. Jones, 473 F.2d 599 (1973). The case involved a forcible entry into a home to search for murder suspects. The Court cited Pierson for the existence of the good faith and probable cause defense, and analyzed this defense in the light of common law principles. This Court's opinion in Bivens is cited at length with regard to the reasonable belief standard. The Court concluded that the standard was the "common law criterion of reasonableness of belief on the part of the officers. 'The privilege to make an arrest for a criminal offense carries with it the privilege to enter land in the possession of another for the purpose of making such an arrest, if the person sought to be arrested is on the land or if the actor reasonably believes him to be there. (Emphasis supplied.) Restatement, Second, Torts §204.'" 473 F.2d at 605-606.

In a lengthy footnote, the Court notes that there is no inconsistency between its opinion and the tests of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, supra. 473 F.2d at 605-606. Although the Court states that reasonable cause was adequate, they do find that probable cause did exist, and set out the evidence in the text at some length in an analysis which demonstrates the existence of probable cause in this case.

Thus the Rodriguez Court, although stating that it was applying a reasonableness test, used that test in such a way as to make it identical with the standards required by the constitutional probable cause determination.

Neither on its facts, nor on the basis of the analysis actually undertaken by the Court, can the decision be said to stand for the proposition that reasonable belief is a sufficient defense in the absence of probable cause.

In the Sixth Circuit, the case of Jones v. Perrigan, 459 F.2d 81 (1972), involved a suit against an F.B.I. agent for false imprisonment and malicious prosecution. The district court had dismissed on the ground that the agent was immune from suit. The Court of Appeals reversed, following this Court's decision in Bivens. The citation to Bivens included the language concerning the reasonable belief defense, but that issue was not before the Court in Jones and the opinion expressed no independent conclusion and did not discuss the question of the defenses available to the officer.

In the Seventh Circuit, Joseph v. Rowlen, 402 F.2d 367 (1968) constitutes the leading case for the proposition that the probable cause defense must be made with reference to constitutional standards. The court held that probable cause in the constitutional sense was required for the officer to defend the charge of an unlawful arrest. The Court recognized the good faith and probable cause defense of Pierson and said that in that case "there is no suggestion that a police officer is entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause." 402 F.2d at 370. Therefore, the Court found that the defendant would be liable unless he could prove that he had probable cause, i.e., "knowledge and trustworthy information sufficient to warrant a prudent man in believing that [plaintiff] Joseph had committed or was committing an offense." Id., at 369.

A similar conclusion was reached by the Seventh Circuit in

Banish v. Locks, 414 F.2d 638 (1969). In that case the Court recognized that good faith and probable cause is a defense to a §1983 action, and analyzed the evidence that led to an arrest for murder in the light of applicable constitutional principles.

In the Eighth Circuit, the issue was raised in Giordano v. Lee, 434 F.2d 1227 (1970). Citing Pierson, the Court held that good faith and probable cause is a defense in a §1983 action. The Court did not even raise the question of a "reasonable belief" interpretation of this defense, and held that the probable cause determination had been properly submitted to the jury by the trial court.

In the Ninth Circuit, there are four decisions which have a bearing on the issue. In Beauregard v. Wingard, 362 F.2d 901 (1966), the Court noted that "the circumstances under which an arrest without probable cause gives rise to a claim under the Civil Rights Act" were not yet "clearly established." Id., at 903. The Court made its analysis in terms of constitutional probable cause, and found that it had existed in that case.

In Notaras v. Ramon, 383 F.2d 403 (9 Cir. 1967), the plaintiff sued for violation of his constitutional rights in that he had been detained for thirty-six hours after his arrest before any charges were lodged against him. The Court specifically noted that there had been probable cause for the arrest. The District Court had dismissed the case after trial for the reason that he had been held no longer than reasonably necessary to conduct an investigation into his participation in the crime for which he had originally been arrested (although not charged). The

Court of Appeals did not reach that issue, for it interpreted the Pierson decision to say that whenever the officers reasonably and in good faith believed that their action was lawful it was a defense to a §1983 suit. The Court said, without any discussion, that a determination that the officers reasonably held such a belief was "implicit" in the District Court's findings. The Court engaged in no discussion at all of its interpretation of the Pierson decision. The Court's opinion, however, is not so much an interpretation as it is simply a misstatement of the Supreme Court's decision in Pierson. The appellant would submit that this decision is of doubtful validity in any case, regardless of the standard used to judge the defendants' actions. Insofar as the Court did make a finding that there was probable cause for the arrest itself, it is unclear due to the brevity of the opinion what relationship, if any, the decision has to the issues in the present case.

In Strutt v. Uphaus, 440 F.2d 1237 (9 Cir. 1971), the Court found that an uncontradicted affidavit on a summary judgment motion established probable cause and affirmed the summary judgment. An apparent assumption of the Court was that probable cause in the constitutional sense was required.

In Williams v. Gould, 486 F.2d 547 (9 Cir. 1973), the case involved a search of an apartment for a felon believed to be therein. The Court cited Joseph v. Rowlen, supra, but did not cite this Court's opinion in Bivens in discussing the defense available to the officer. With regard to the entry, the Court concluded that the appropriate standard by which to judge the entry was whether the officer had a good faith and

reasonable belief that there was a felon on the premises, citing common law authorities. It is not obvious that this formulation incorporates all of the constitutional principles of the probable cause requirement. However, this rule is stricter than that suggested by Bivens, for under Bivens the question would have been whether the officer reasonably believed that his belief that there was a felon on the premises was reasonable. With regard to the necessity of procuring a warrant, however, the Court did state that because of the uncertainty of the law in this area the reasonable belief standard was appropriate.

It is difficult to summarize the Ninth Circuit cases in order to determine the rule in that Circuit. Indeed, even within the Williams case, two different standards are applied for different questions in the case. It can only be concluded that the decisions of the Ninth Circuit do not provide clear precedent for either rule under discussion.

In the Tenth Circuit, the issue was mentioned in Valdez v. Black, 446 F.2d 1071 (1971). In that case the parties had agreed that any arrest or detention of the plaintiffs by defendant state police officers had to have been on the basis of probable cause, and the Court proceeded on that premise.

Decisions of the district courts are also split on the question of the appropriate standard for the defense of good faith and probable cause. The constitutional standard was applied in the case of Ford v. Wells, 347 F.Supp. 1026 (E.D. Tenn. 1972). In an unlawful arrest case, the Court followed the tests of Beck v. Ohio, supra, at 96-97, in finding that the arresting officer did not possess probable cause, and gave

judgment for the plaintiff. The Court emphasized that "good faith" was a defense, but followed Pierson in finding that probable cause was also required. That probable cause is a high enough standard to protect a police officer who has not violated a citizen's constitutional rights is made clear from a reading of the whole opinion, for the Court found for the plaintiff only after giving the officer every consideration and "despite the firm determination of this Court to afford any peace officer the greatest protection from liability in effecting arrests." 347 F.Supp. at 1028. The fact is that probable cause is the "greatest protection" which the courts may constitutionally give to an officer.

In United States ex rel. Smith v. Heil, 308 F.Supp. 1063 (E.D. Pa. 1970), the Court held that an arrest without probable cause subjects the arresting officer to liability under §1983, "even though the arresting officer acts in good faith but lacks probable cause." Id., at 1065. In Grisom v. Logan, 334 F.Supp. 273 (C.D. Calif. 1971), the Court applied the constitutional standards of Henry v. United States, supra, to find that probable cause existed for an arrest. This analysis was applied in judging the good faith and probable cause defense under Pierson.

In Richardson v. Snow, 340 F.Supp. 1261 (D. Md. 1972), the Court reached the issue with which we are concerned only indirectly. Plaintiff had filed a motion to compel the identity of an informant who had given information to one police officer who had passed it on to defendant police officer. The Court held that disclosure was not necessary because the only issue was the reasonableness of the defendant officer's belief that he had probable cause, not whether there actually was probable cause.

The Court cited this Court's opinion in Bivens for this proposition. However, the result in this case does not necessarily follow from the Bivens opinion, which does not say that probable cause is irrelevant in a §1983 action. Indeed, even under Bivens, probable cause is still of crucial relevance as to whether the plaintiff can make out a case of illegal search, without regard to whether the officer might have a reasonableness defense. The Richardson opinion is not well reasoned, and it may well be that the real reason for the decision might be found in the court's reluctance to order divulged the name of an informant, rather than in an analysis of the good faith and probable cause defense.

In Lykken v. Vavreck, 366 F.Supp. 585 (D. Minn. 1973), the Court stated that a reasonable good faith belief in the existence of probable cause would be a defense, even if probable cause were not present, citing this Court's opinion in Bivens. However, the Court there did not reach the issue of probable cause, since it found a lack of good faith on the part of the police, who had broken up a peaceful meeting for the obvious purpose of political harassment. Thus the Court's statements concerning the reasonable belief defense were dicta.

A review of the above cases indicates that there is no clear line of authority in the decisions with regard to the issue in this case. However, it is clear that the operating assumption of most courts is that constitutional probable cause is required. Only Hill v. Rowland, supra, squarely holds that reasonable belief in probable cause is sufficient in a case where that was the specific point in issue and where the resolution of that issue made a difference in the result. The dictum of this

Court in Bivens, however, has caused some confusion in other cases where the point was not squarely in issue. For the reasons stated in this brief, appellant submits that this Court should reconsider its opinion in Bivens, and restore the constitutional principles of probable cause to the position of clear prominence which the Fourth Amendment requires.

G. The Court's Charge To The Jury Incorporated A Determination Of "Reasonableness" Which Was Unnecessary And Which Was Not Only Confusing To The Jury, But Prejudicial To The Plaintiff.

The Court charged the jury that if they found that the search of the plaintiff's home was unreasonable and the plaintiff's constitutional rights had been violated, they then could consider the defenses available to the officers. The Court instructed the jury:

> As I mentioned, they have a defense if two things are so. If they believed in good faith that their conduct was lawful, and if that belief in the validity of their entry, if they had such a belief, was a reasonable belief. The first question, the good faith part of that is subjective as to either officer you are considering at the time. The question is: did he believe in his own mind that his conduct was lawful? The second part of the defense test is subjective--excuse me--is objective. Let me go over that again. The first part is subjective; it is whether the officer in his own mind had a good faith belief in the reasonableness of what he was going (sic); but the second question is objective, it's if he believed his conduct was lawful, was this a reasonable belief under all the circumstances? That is, was it a reasonable belief in the validity of the search to find the persons to be arrested? (A. 53)

The Court's charge thus involved a three-pronged question. First, was the search reasonable? Second, did the officers have good faith? Third, was the officers' good faith reasonable? The Court construed the "good faith and probable cause" test consistent with its reading of this Court's decision in Bivens. Namely, the Court did not hold that the

officers had to establish the existence of probable cause in a constitutional sense, but only that they had a reasonable good faith belief that their action was lawful.

The Court adopted the same three-pronged inquiry with regard to the manner in which the search was conducted. First, was the method of entry reasonable? Second, did the officers have good faith? Third, was the officers' belief that the manner of their entry was lawful, a reasonable belief? (A. 55-56)

It may easily be seen that this type of charge in reality gives the officers a double chance to make out their defense. If they cannot convince the jury that the entry was on the basis of probable cause and fell under one of the exceptions to the warrant requirement, and that the manner of entry was reasonable under constitutional standards, they can try to persuade the jurors that it was reasonable for them to think that these standards had been met. The flaw in this "double defense" is that the constitutional standards are in the first place based on reasonableness. The probable cause determination is in essence a question of whether a reasonably prudent man would have had reasonably trustworthy information to warrant a belief that the persons sought were on the premises. Mr. Justice Clark, sitting by designation, in United States v. Brown, 467 F.2d 419, 424 (1972), stated that probable cause is "essentially a concept of reasonableness." The question of the legality of proceeding without a warrant involves the question of whether such exigent circumstances were present as to reasonably compel the conclusion that immediate action was required. The manner of entry question involves a determination

of whether it was reasonable under the facts of the case for the officers not to give notice of their authority or not to wait a longer time for someone to open the door.

That these standards of reasonableness are already taken into account in the constitutional standards makes it unnecessary to give the officers an additional reasonableness protection. It also confuses the issues for the jury. This was noted by the Court in its charge:

> I know it's a bit confusing because the word 'reasonable' comes up in different contexts. When you are trying to determine whether the plaintiff's right was violated, you have to determine the reasonableness of a warrantless entry at nighttime. Then if you find that the search was unreasonable, according to the Constitution, then you have to consider whether it was reasonable for the officers to believe that the search was reasonable. (A. 54)

This attempt to relieve the confusion does not answer the question of just what factors the jury is supposed to consider in determining whether "it was reasonable for the officers to believe the search was reasonable." Indeed, nowhere in the charge is that question answered, nor was it answered in this Court's opinion in Bivens.

Would it be relevant, for example, for the officers to introduce evidence (they did not, in this case) of their training in constitutional law, or of weekly seminars on the latest court decisions, to show that they tried to follow the law and that their mistakes were such as the jurors or reasonable men might have made as well? Would it be relevant to introduce evidence (none was, in this case) of court decisions themselves to show the reasoning of the officers in coming to their conclusion that their actions fell within the ambit of proper police procedure as held in the decisions. If such evidence were relevant, the Court would necessarily

have to charge the jury on the various factors which reasonable men might take into account in reading and applying the court decisions or the content of the seminars, and on what standards to use to determine whether any errors by the officers were "reasonable." Appellant submits that it is this approach which would lead to the "thicket" of legal arguments that Bivens sought to avoid. 456 F.2d at 1348.

Appellant submits that the simple answer is that this whole inquiry is unnecessary and confusing. It simply opens the door to the jurors to rely on their own prejudices and emotions in determining whether the officers reasonably believed that an unreasonable search was reasonable. A charge such as that given in this case merely impresses on the jury that the officers are not really held to constitutional standards, but that they have an "out" if the jurors conclude that according to some undefined criteria the officers' mistakes were "reasonable" ones. It has been noted that jurors are loath to find against officers in police misconduct cases in any event. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 655, 673 (1970). Amsterdam, supra, at 360. Chief Justice Burger has stated, "There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house....Jurors may well refuse to penalize a person they believe to be a 'criminal' and probably will not punish an officer for honest errors of judgment." Bivens v. Six Unknown Fed. Narcotics Agents, supra, at 421-422

(dissenting opinion). In the light of the disinclination of jurors to find for plaintiffs in §1983 damage actions in any event, to provide them with an additional escape from liability for the officers such as the "reasonableness" standard herein discussed is to increase the danger that citizens' constitutional rights cannot be protected by damage actions. This must not be allowed by a legal system committed to a vigorous defense of Fourth Amendment rights.

II. THE EFFECT OF THE CHARGE OF THE COURT BELOW WAS TO REMOVE THE ISSUE OF PROBABLE CAUSE FROM THE CASE ALTOGETHER, IN VIOLATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS.

The charge to the jury by the District Court posed a two-part inquiry. The first question was whether the plaintiff's constitutional rights were denied, and the second was whether the officers had a defense for their actions. With regard to the first question as it applied to entry into plaintiff's home itself, the Court charged:

> The plaintiff has a constitutional right to be secure in her home against unreasonable searches. So if there was an unreasonable search of her home, she was denied a right secured by the Constitution. (A. 49)
>
> Whether the plaintiff's constitutional right was violated depends upon whether the decision to enter her house to make that arrest of the Jones brothers without a warrant was a reasonable decision under all the circumstances. (A. 50)

The Court explained the reasons why a warrant is usually required for a search, and then continued:

> ...but in some limited circumstances a search is reasonable within the meaning of the Fourth Amendment, even if made without a warrant. But bear in mind that searches without warrants are the exception and can only be justified by special circumstances, what the law sometimes calls exigent circumstances, circumstances that make it reasonable to act promptly to enter a home to make an arrest and to make that entry without a warrant. (A. 51-52)

Following that statement, the Court set out the factors which bear on the reasonableness of an entry into a home without a warrant:

> They are, in this case, whether the officers had a sufficient basis for believing that the Jones brothers were then at 671 Winchester Street, plaintiff McEachern's apartment; whether there was time to get a search warrant; whether taking the time to get a warrant created an unacceptable risk that the Jones brothers might leave and take the heroin with them; whether it was reasonable to station one officer at the apartment while the other went to get a warrant; whether the crime the officers believed the Jones brothers had committed was serious enough to justify prompt action to find and arrest them; and whether the time of night was such that special care should be taken to be sure the officers had the right apartment before entering. In short, all of the circumstances that you find to have existed at the time the officers decided to enter the apartment may be considered in deciding whether that decision to enter without a warrant was a reasonable one. If you conclude it was reasonable to enter the apartment without a warrant, then there was no violation of plaintiff's constitutional right; but if you find that it was unreasonable to enter without a search warrant, then her constitutional right was violated. (Emphasis supplied) (A. 52)

The Court further charged the jury that if they found the search was "reasonable," "then that's the end of the case as far as the decision to enter is concerned." (A. 53)

It is clear from the Court's charge that the jury might have found for the defendants on the basis of a conclusion that the search was "reasonable" in light of the various factors spelled out by the Court. In that event, the jury would not have reached the good faith and reasonable belief defense, for they would have reached "the end of the case."

The Court did not use the phrase "probable cause" in instructing the jury on the constitutionality of a warrantless entry. The charge on this point was merely whether there was a "sufficient basis" for believing the Jones brothers were on the premises. What would constitute a "sufficient basis" was left entirely up to the jury. With regard to this

particular point, the jury was not instructed that they had to find the existence of "facts and circumstances" within the officers' knowledge and "of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that" the Jones brothers were on the premises. See, Brinegar v. United States, supra, at 175-176. The jury was not told that the "sufficient basis" had to be enough to create a reasonable belief in a reasonable man that the Jones brothers were on the premises.

The absence of any explanation of probable cause standards, or, for that matter, of the reasonable man torts standard, left the jury free to use their own subjective judgment about what constituted a "sufficient basis" for the officers' belief in the Jones brothers' presence. Thus the jury might have found the existence of such a sufficient basis without regard to either the existence of probable cause in a constitutional sense, or the existence of a reasonable belief in a torts sense. The jury might well have reached "the end of the case" on the basis of their wholly subjective judgment that there was a "sufficient basis" for the search. In this respect, the charge to the jury was clearly defective.

Moreover, the jury might have found for the defendants without finding probable cause for the search, or reasonable belief, or sufficient basis. This is so because "sufficient basis" to believe the Jones brothers were on the premises was only one of many factors which the Court allowed the jury to consider in determining that the search was "reasonable". Even assuming that "sufficient basis" is synonomous with "probable cause" the Court listed six separate factors bearing on the

reasonableness of the search, of which that was only one. The underlined portion of the excerpted charge above makes it clear that the jury might have found an absence of a "sufficient basis" to believe in the presence of the fugitives, but decided that because the crime for which they were sought was serious and there was a likelihood that they might escape, the search was "reasonable." The jury might in fact have been encouraged to come to this conclusion on the basis of the Court's earlier statement that a warrantless search may be justified "by special circumstances, what the law sometimes calls exigent circumstances." (A. 51)

The Court's charge clearly holds out the possibility that a warrantless search may be justified by exigent circumstances, even in the absence of probable cause. That is not the law, and the Supreme Court has repeatedly held to the contrary. Exigent circumstances may justify in exceptional situations a decision by the officer rather than the magistrate that probable cause exists, but "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." Chambers v. Maroney, 399 U.S. 42, 51 (1970).

This precise issue was presented to the Third Circuit Court of Appeals in Fisher v. Volz, supra. In a §1983 damage action, plaintiff Bass sued on the basis of an illegal search of her apartment by police officers looking for a bank robbery suspect. The Court's charge to the jury listed eleven factors to consider in determining the validity of the search, of which probable cause and "strong reason to believe" in the presence of the fugitives were only two. Other factors went to the question

of whether exigent circumstances were present.

As in the instant case, "The charge clearly permitted the jury to return a verdict against plaintiff Bass if it found that the existence of some of the factors enumerated by the trial court created 'exigent circumstances' which justified the entry into her apartment, even though there might not have been probable cause to enter." Id., at 338. On that basis, the Court reversed, holding:

> Even if exigent circumstances exist, police officers without a valid search warrant may not constitutionally enter the home of a private individual to search for another person, though he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time. Id., at 338.

The Court explained the policy behind this rule as follows:

> A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home. Permitting reliance by the officer solely on exigent circumstances offers too many opportunities for abuse, provides little comfort to a citizen peacefully in his home, and affords insufficient protection against invasions of his privacy. A requirement that the officer must also have probable cause to believe that the suspect is in the dwelling will not unduly restrict the effectiveness of police action but will reduce the obvious risks of abuse. It offers police considerable latitude but also requires a necessary amount of restraint. It should enable the police to act reasonably but not oppressively, promptly but not recklessly, lawfully but not offensively. Id., at 341.

This decision of the Third Circuit was based in part on its recent decision in United States v. Rubin, 474 F.2d 262 (1973), which also held that probable cause is an indispensable element for a warrantless search of a dwelling.

That probable cause is required to search without a warrant was also decided by the Fourth Circuit in Lankford v. Gelston, 364 F.2d 197

(1966) and by the District of Columbia Circuit in United States v. Brown, supra, in an opinion by Mr. Justice Clark, sitting by designation. In United States v. McKinney, 379 F.2d 259 (1967), the Sixth Circuit held that the police could execute an arrest warrant on the premises of a third party without a search warrant if they "reasonably believed" that the suspect was on the premises. The Court defined "reasonable belief" as equivalent to "probable cause" and made its analysis in the light of McCray v. State of Illinois, 386 U.S. 300 (1967).

In none of the Supreme Court cases creating exceptions to the warrant requirement in cases involving exigent circumstances has the Court abandoned the requirement of probable cause. In Warden v. Hayden, 387 U.S. 294 (1966), for example, the Court enunciated the "hot pursuit" doctrine, holding that a warrantless search of a home by officers in "hot pursuit" of a fleeing armed robbery suspect was not in violation of the Fourth Amendment warrant requirement. In that case it was abundantly clear that the officers had probable cause to search, and the search was allowed due to the exigent circumstances of the situation.

The case of Dorman v. United States, 140 U.S.App.D.C. 313, 435 F.2d 385 (1970), does not compel a conclusion that exigent circumstances may justify a warrantless entry of a home to search for a fugitive absent probable cause. Dorman was found not to be controlling in Fisher v. Volz, supra, and was distinguished on its facts. For the same reasons the case may be distinguished here, principally that in Dorman the police went to the home of the suspect himself, and did not search the home of a third party without a warrant and without probable

cause. Even though the Dorman Court did not hold that probable cause that the suspect was on the premises was an independent requirement, the Court did state: "There was no special knowledge that he was at home, but concepts of probable cause and reasonableness prima facie justify looking for a man at home after 10 p.m." 435 F.2d at 393. Whether this relaxed standard of probable cause would apply to a search of a third-party's home was not confronted by the Court in Dorman, and therefore the decision is not determinative of the issues raised here.

Even before the issue of the officers' defense to an unconstitutional search might be reached by the jury, the Court's charge in this case allowed a verdict for the defendants if the search was "reasonable," as based on exigent circumstances, even though it may have been without probable cause. Appellant asks this Court to follow the decision of the Third Circuit in Fisher v. Volz, supra, and hold that such a charge is defective in that probable cause is an independent requirement of a warrantless search, notwithstanding the existence of exigent circumstances.

Appellant submits that constitutional probable cause is a base line requirement for a search of a citizen's home, and that this requirement may not be by-passed by a police officer defendant in a civil action, whether by justifying the search on the basis of "exigent circumstances," or by affording the officer a defense which does not incorporate constitutional standards. The Court's charge in the present case did both, and was therefore constitutionally defective on both grounds.

III. CONCLUSION

For the foregoing reasons, the charge to the jury by the Court below was defective in the light of constitutional principles, and the decision of the District Court should be reversed and the case remanded for a new trial, in which the jury should be charged that in order to establish a defense, the officers must prove that they had probable cause for the search, as defined under appropriate constitutional standards.

Respectfully submitted,

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